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Supreme Court, U.S.
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No. 07-1383

In The

Supreme Court of the United States

SHOZDIJIJI SHISINDAY, a.k.a. Danny Dean Thomas,
Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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This is a capital case.

QUESTIONS PRESENTED

1. ShisInday's first conviction was overturned pursuant to *Riggins v. Nevada*, 504 U.S. 127 (1992), because the trial court failed to submit findings of fact to justify forcibly medicating ShisInday. During ShisInday's second trial sixteen years later, the State read into the record testimony from Ernest Gilliam, who testified at the first trial but subsequently passed away. Gilliam had merely testified that he sold the murder weapon to ShisInday. Assuming *arguendo* that this combination of circumstances resulted in a violation of ShisInday's right to confrontation, is this violation subject to a harmless error analysis? If so, was the admission of Gilliam's testimony harmless considering that it was cumulative of other evidence proving ShisInday was in possession of the gun and that ShisInday confessed to committing murder?

2. The trial court refused to instruct the jury regarding the consequences of a deadlock, over ShisInday's objections. Texas law forbids the trial court from doing so. For the first time in federal court, ShisInday challenges the Texas statutory sentencing scheme. Does this Court lack jurisdiction to consider ShisInday's claim that the statute is unconstitutional for containing this prohibition? If not, is ShisInday's claim barred pursuant to *Teague v. Lane*, 489 U.S. 288 (1989), and foreclosed under *Jones v. United States*, 527 U.S. 373 (1999)?

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A. ShisInday is actually claiming that a Confrontation Clause violation occurred, not *Riggins* error. In fact, *Riggins* has no application to ShisInday's second trial because the *Riggins* error was cured when ShisInday received a new trial. Thus, any error pertaining to retrial must be assessed for harmlessness. . . . 11

B. The harmless error doctrine applies to ShisInday's claim; *Crawford v. Washington* does not alter that rule. 14

C. Any error was unquestionably harmless given the substantial evidence of ShisInday's guilt. 18

II. This Court Does Not Have Jurisdiction To Consider ShisInday's Claim That The Texas Statutory Sentencing Scheme Is Unconstitutional Because He Failed To Present That Claim To The Fifth Circuit. Regardless, His Allegation Is *Teague* Barred And Foreclosed Under *Jones v. United States*. 23

A. This Court lacks jurisdiction to consider the instant claim. 24

B. Regardless, ShisInday is requesting a new rule of constitutional law striking down the Texas statutory scheme for not requiring courts to instruct jurors on the consequences of a deadlock, although this Court has held that such a rule is not relevant to a jury's role in sentencing. 25

C. ShisInday's argument that *Jones* is factually distinct from his case and, thus, should not apply is ineffectual. *Jones* did not hold that an instruction regarding the consequences of a deadlock must be given in certain cases. And even if it did, this would not be one of those cases because the Texas statutory scheme does not mislead jurors. 28

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Petitioner Shozdijiji ShisInday, a.k.a. Danny Dean Thomas,[1] resides on Texas's death row for the brutal murder of Sylvia Harrison. He now challenges his conviction pursuant to 28 U.S.C. §§ 2241 and 2254, arguing that (1) the admission of testimony from a deceased witness during his second trial violated his constitutional rights, and (2) the Texas statutory punishment scheme is unconstitutional because it precludes a jury from being informed of the consequences of a deadlock. However, certiorari review is unwarranted.

ShisInday's original 1982 conviction was reversed pursuant to *Riggins v. Nevada*, 504 U.S. 127 (1992), because the trial court failed to submit any findings to support the forced medication of ShisInday, who was suffering from psychosis at the time. At ShisInday's second trial sixteen years later, the testimony from Ernest Gilliam, who was a witness at the first trial but died during the interim, was read into the record. ShisInday claims that the admission of this evidence violated his right to confrontation under *Riggins* because he was unable to adequately cross-examine Gilliam at his first trial due to his medicated state. ShisInday further argues that a harmless-error standard does not apply under *Riggins*. But *Riggins* is now irrelevant. The *Riggins* error was cured when ShisInday received a new trial, and ShisInday was not medicated during his second trial. Therefore, if any error occurred from the reading of Gilliam's testimony, it is subject to a harmless-error analysis, as are all Confrontation Clause allegations. And, as the lower courts determined, any error was

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[1] Respondent Nathaniel Quarterman is referred to as "the Director."

certainly harmless. Gilliam's testimony merely established that ShisInday purchased the murder weapon. This was cumulative evidence because several other witnesses testified that ShisInday was in possession of the firearm shortly before he murdered Harrison. Further, the gun was found in ShisInday's car covered in Harrison's blood, and he confessed to the murder. Thus, the Fifth Circuit's conclusion – that the district court's resolution of this claim is not subject to debate – is appropriate.

ShisInday also argued in the lower courts that the trial court violated his due-process rights during punishment by instructing the jury to continue deliberating after the jury informed the court that it was deadlocked. ShisInday claimed that the court's instructions were coercive in light of the fact that the court failed to instruct the jurors that a deadlock would result in a life sentence. However, ShisInday now argues that the Texas statutory sentencing scheme is unconstitutional because it prohibits a court from informing the jury of the consequences of the failure to agree on the special issues. ShisInday did not challenge the statute in his application for a certificate of appealability ("COA") in the Fifth Circuit; therefore, this Court lacks jurisdiction to consider the allegation. However, even if this Court could review the claim, this Court has never held that the statute is unconstitutional. ShisInday is asking this Court to apply retroactively a new rule of constitutional law, which would be barred pursuant to *Teague v. Lane*, 489 U.S. 288 (1989). Moreover, in *Jones v. United States*, 527 U.S. 373 (1999), this Court determined that a trial court is not required to instruct the jury on the consequences of a deadlock because that information has no bearing on a jury's role

in the sentencing process. Therefore, ShisInday's claim lacks any merit, and this Court should deny certiorari review.

JURISDICTION

Under 28 U.S.C. § 1254(1), the Court lacks jurisdiction to consider ShisInday's constitutional challenge to the Texas statutory sentencing scheme because it was not "'pressed [in] or passed on' by the Court of Appeals." *United States v. Wells*, 519 U.S. 482, 488 (1997) (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992) (brackets in *Wells*)). ShisInday also presents a new argument that, under *Crawford v. Washington*, 541 U.S. 36 (2004), Confrontation Clause error is structural and, thus, not subject to a harmless error analysis. Because the Fifth Circuit did not have an opportunity to address that issue, this Court lacks jurisdiction to consider it. The remainder of ShisInday's allegations are properly before the Court.

STATEMENT OF THE CASE

I. Facts of the Crime

The United States Court of Appeals for the Fifth Circuit summarized the relevant facts of the case as follows:[2]

> The evidence at the guilt/innocence phase of trial revealed that in July of 1981, ShisInday and his girlfriend, Phoebe, were

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[2] The summary is taken from the Texas Court of Criminal Appeals's and federal district court's opinions.

staying at the home of James Peels, his two sons, fifteen-year old Doyle Peels and seventeen-year-old Zendal Peels, and Martha Ann Tarver. On July 17, ShisInday gave Doyle a ride in his 1969 black-and-white Cadillac to pick up Doyle's work schedule at K-Mart. ShisInday entered the store with Doyle and purchased some ammunition in the sporting goods department. Later that evening, ShisInday, accompanied by Zendal, drove Doyle and Ronald McHenry to the skating rink.

According to ShisInday's July 9th transcribed statement and testimony from other witnesses, ShisInday and Zendal went shopping at a Safeway store after dropping the boys off at the rink. As they were leaving the store, they spotted nineteen-year-old Sylvia Harrison who was having car trouble. They stopped to help her, and ShisInday determined that she needed a new fan belt. They drove her across the street to an auto parts store, purchased the belt, and put it on her car. Harrison asked ShisInday and Zendal to follow her down the street to her house to make sure her car did not overheat again. Once they arrived, ShisInday fixed a leak in her car's "heater hose." She offered them a beer and invited them into the house. They sat in her living room, drank beer, and smoked some marijuana.

According to ShisInday's statement to the police, Zendal unexpectedly hit Harrison in the side of the head with ShisInday's gun, which Zendal had concealed in a paper bag. They carried Harrison, unconscious, out to the car and shoved her down on the passenger-side floorboard. They also took several items from her house including her telephone and eye glasses. ShisInday drove away with Zendal sitting in the passenger seat. Harrison regained consciousness, kicked the steering wheel, and bit ShisInday's hand. ShisInday told Zendal to grab her, and Zendal hit her in the head again with the gun, knocking her out. She regained consciousness again, and Zendal repeatedly hit her in the head with his knife until she passed out. She came to once more and began repeating, "God help me." ShisInday got his gun, put it to the side of her head, and shot her one time. They drove her to a bridge near the river and picked up some cinder blocks. They then drove to a more secluded bridge and parked under one of the support pillars. ShisInday looked around to see if anyone was nearby. Zendal removed Harrison's clothes and cut off her bra. After tying cinder blocks to Harrison's feet and neck with a rope, they dumped her in the San Jacinto River. ShisInday broke off a willow branch and brushed away their footprints as they returned to the car. They drove to a grocery store parking lot where they threw Harrison's clothes and other personal items

in a dumpster. Then they went to a car wash and washed the outside and inside of the car, particularly the floorboard, which was covered in blood.

After disposing of Ms. Harrison's body, Zendal and ShisInday returned to the Peels' home between four and five a.m. Zendal Peels' father accused ShisInday and Zendal of being late because they were smoking pot. ShisInday explained that they had car trouble. ShisInday then went to sleep in a back bedroom with his girlfriend.

The Peels family soon discovered blood on the outside and inside of ShisInday's vehicle. ShisInday's girlfriend woke him up in the morning and confronted him about the blood. ShisInday claimed that he ran over a dog, put it in his car, and mercifully killed the dog to end its suffering. ShisInday told the same story to the Peels family. When the Peels and ShisInday's girlfriend did not believe his story, ShisInday decided to leave. Before going, ShisInday threatened Zendal "[i]f I go down, you are going down with me because you are in this with me."

ShisInday, who had a long history of mental problems, soon sought treatment at a psychiatric hospital claiming that others accused him of killing a person when he actually killed a dog. After talking to Zendal Peels, and going to Ms. Harrison's

> residence and finding that there had been a fire, the police arrested ShisInday at around 1:00 a.m. at the hospital. ShisInday initially repeated his dog story to the police, but he later confessed to killing Ms. Harrison.

ShisInday v. Quarterman, 511 F.3d 514, 517-19 (5th Cir. 2007); Petition, Appendix A at 2-5

II. Trial, Direct Appeal, and Postconviction Proceedings

ShisInday was twice convicted and assessed the death penalty for the July 1981 capital murder of nineteen-year-old Sylvia Harrison. His first conviction was reversed and vacated by a federal district court in 1997 under *Riggins v. Nevada*. *See Thomas v. Johnson*, No. H-95-5236 (S.D. Tex. July 2, 1997); Petition, Appendix E.

In his 1998 retrial, a second jury found ShisInday guilty of capital murder, CR 409,[3] and answered the punishment-phase special issues that resulted in ShisInday's second death sentence. *Id.* at 426-29, 441. The Texas Court of Criminal Appeals affirmed the

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[3] "CR" refers to the clerk's record of pleadings and documents filed with the court during trial, followed by page number(s). "RR" refers to the reporter's record of the evidence and testimony presented at trial, preceded by volume number and followed by page number(s). "SX" refers to the State's Exhibits admitted at trial, followed by exhibit number(s) "SHCR" refers to the state habeas record, followed by page number(s).

conviction and sentence on direct appeal in an unpublished opinion. *ShisInday v. State*, No. 73,351 (Tex. Crim. App. Sept. 12, 2001); Petition, Appendix D.

On state habeas review, the trial court entered findings of fact and conclusions of law recommending denial, SHCR 2113-91, which the Court of Criminal Appeals adopted in an unpublished, per curiam order. *Ex parte Danny Dean Thomas a.k.a. Shozdijiji ShisInday*, No. 15,153-07 (Tex. Crim. App. March 9, 2005); Petition, Appendix F.

ShisInday timely initiated federal habeas corpus proceedings. Following review, the federal district court denied habeas relief and denied a COA. *ShisInday v. Quarterman*, No. H-06-814, 2007 WL 776680 (S.D. Tex. March 9, 2007); Petition, Appendix C. ShisInday filed an application for a COA in the Fifth Circuit on July 12, 2007. The appellate court denied ShisInday a COA in a published opinion on December 20, 2007. Petition, Appendix A. The instant petition for writ of certiorari followed.

REASONS FOR DENYING THE WRIT

I. The District Court's Denial Of ShisInday's Confrontation Clause Claim Is Not Debatable. Even If The Trial Court Erroneously Admitted Ernest Gilliam's Testimony During ShisInday's Second Trial, That Ruling Is Subject To A Harmless Error Analysis. And Given The Substantial Evidence Of ShisInday's Guilt, Any Error Was Clearly Harmless. Therefore, Certiorari Review Is Not Warranted.

ShisInday argues that the lower courts improperly applied a harmless-error analysis to reject his underlying Confrontation Clause claim. ShisInday points to the reversal of his first trial under *Riggins v. Nevada* and alleges that because he was unable to confront witness Ernest Gilliam at the first trial due to the effects of forced medication, the admission of Gilliam's testimony in his second trial was constitutionally deficient for the same reason. Petition at 12-27.

On July 2, 1997, the federal district court ordered ShisInday's 1982 conviction set aside under *Riggins* based on the lack of trial-court findings in the record to justify that ShisInday's prescribed treatment with antipsychotic drugs was medically appropriate and necessary for the sake of ShisInday's safety or the safety of others. Petition, Appendix E. Prior to granting relief, the district court addressed and found meritless ShisInday's other twenty-seven grounds for federal habeas relief, including a competency allegation. *See Thomas v. Johnson*, No. H-95-5236. In denying that claim, the district court noted: "[ShisInday] was found competent to stand trial. He was found to have the

ability to consult with his lawyer with a reasonable degree of rational understanding, and was found to have a rational as well as factual understanding of the proceedings against him." *Id.*, slip op. at 31-32; *see also* SHCR 1309-10 (State's Exhibit "B").

During ShisInday's retrial in 1998, the State offered the 1982 testimony of Ernest Gilliam, along with a death certificate showing that Gilliam had passed away. Petition, Appendices N & O. ShisInday objected to the admission of the testimony on the ground that he lacked the ability to cross-examine Gilliam during the first trial due to his medicated state. *Id.* at Appendix O. The trial court overruled the objection, and the State read Gilliam's testimony to the jury. *Id.* The testimony was brief: in short, Gilliam stated that he knew ShisInday and that he recognized State's Exhibit 10 as the .25 automatic pistol he owned and later sold to ShisInday for fifty dollars in July 1981. *Id.* at Appendix N. Gilliam testified on cross-examination that the gun had one clip when he sold it to ShisInday. *Id.* Neither party asked Gilliam any further questions.

ShisInday now offers a three-part argument pertaining to his underlying Confrontation Clause allegation: (1) the *Riggins* violation that affected his first trial essentially carried over to his second when Gilliam's testimony was admitted; (2) Confrontation Clause violations should not be subject to a harmless-error analysis under *Crawford v. Washington*; and (3) the admission of Gilliam's testimony was not harmless. Petition at 14-27. These arguments are meritless.

A. ShisInday is actually claiming that a Confrontation Clause violation occurred, not *Riggins* error. In fact, *Riggins* has no application to ShisInday's second trial because the *Riggins* error was cured when ShisInday received a new trial. Thus, any error pertaining to retrial must be assessed for harmlessness.

ShisInday's *Riggins* argument is as follows: a harmless-error analysis does not apply to a *Riggins* violation; therefore, because *Riggins* error occurred during his first trial, the admission of any evidence during his second trial that was taken from his first cannot be harmless. Petition at 14-17. In other words, ShisInday is attempting to bootstrap *Riggins* to his second trial. His claim is flawed on several fronts.

In *Riggins*, the defendant, who was on trial for robbery and murder, suffered from psychosis. 504 U.S. at 129-31. Riggins was involuntarily medicated throughout trial without explanation from the trial court why medication was necessary. *Id.* at 131. Riggins moved to terminate medication, but the court denied that request. *Id.* At trial, Riggins pleaded insanity and testified on his own behalf. *Id.* This Court ultimately reversed, holding that the trial court failed to acknowledge Riggins's liberty interest in being free from unwanted antipsychotic drugs. *Id.* at 137. Considering reports from various doctors, the Court determined that the side effects of this medication might have altered Riggins's appearance, the content of his testimony, his ability to follow the trial proceedings, or his ability to consult with counsel. *Id.* The Court also rejected the argument that Riggins needed to show how

he was harmed by the forced medication. "Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins' motion had been granted would be purely speculative." *Id.* The Court concluded that because the record was devoid of findings "that might support a conclusion that administration of antipsychotic medication was necessary to accomplish an essential state policy ... we have no basis for saying that the substantial probability of trial prejudice in this case was justified." *Id.* at 138.

Therefore, a harmless-error analysis did not apply to Riggins because the Court had no way of determining, even at the very least, the nature of the error that might have occurred. Indeed, Riggins did not allege specific constitutional violations; he generically claimed that forced administration of antipsychotics denied him the ability to assist in his defense and "prejudicially affected his attitude, appearance, and demeanor at trial." *Id.* at 131.

But that is not the case here. ShisInday has made it clear that he is alleging a Confrontation Clause violation pertaining to the admission of Gilliam's testimony. This is a claim that can be assessed for harmless error. For example, the record does not contain any evidence that ShisInday was actually unable to assist in the cross-examination of Gilliam due to being medicated at his 1982 trial. The district court correctly noted that "ShisInday offers no compelling area in which he could have cross-examined Mr. Gilliam differently than his attorneys did in the first trial. ShisInday makes no showing that deeper cross-examination of Mr. Gilliam in the second trial would have lessened the incriminating

nature of his testimony." Petition, Appendix C at 46. Moreover, the federal district court's original reversal under *Riggins* was based solely on the trial court's failure to make the factual findings necessary to justify ShisInday's medication, not that ShisInday was incompetent to confront Gilliam. *Id.*, Appendix E. In fact, as shown above, the federal district court found that ShisInday was competent to stand trial and that he was capable of assisting his attorneys in cross-examining the witnesses.

Be that as it may, even if Gilliam's 1982 testimony was tainted under *Riggins*, this does not save ShisInday. The fatal flaw in ShisInday's argument is that he is focused on the wrong trial. In other words, the issue is not whether ShisInday's confrontation rights were impeded during his first trial when he was on antipsychotics, but whether the reading of Gilliam's testimony at ShisInday's second trial transgressed those rights. ShisInday was not medicated the second time around, so *Riggins* is no longer relevant. Therefore, this is strictly a Confrontation Clause claim pertaining to the admission of evidence during retrial. Consequently, as discussed below, a harmless-error analysis absolutely applies.[4]

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[4] Although, the Director is assuming *arguendo* that error occurred, he is not conceding this point. Gilliam's testimony was debatably admissible under the Texas Rules of Evidence, Rule 804(b)(1), former testimony from an unavailable declarant whom the defendant had an *opportunity* to cross-examine. As shown above, the record indicates that ShisInday was not denied an opportunity to develop Gilliam's 1982 testimony through cross-examination, despite ShisInday's medicated state. Nonetheless, because this case

ShisInday offers the novel argument that his second trial was, in essence, a continuation of the first and, consequently, that *Riggins* affects both. Petition at 16. ShisInday disregards that the *Riggins* error was cured when he received a second trial and that the two trials were sixteen years apart. Moreover, this Court has never held that *Riggins* error, nor any error for that matter, carries over from one trial to another. And ShisInday cites to no precedent holding that a second trial constitutes a continuation of the first. The adoption of ShisInday's argument would require the creation of a new rule constitutional law barred under *Teague v. Lane*, 489 U.S. at 310. It would also lead to the absurd result of never-ending trials and render meaningless the states's interest in finality. In short, this is not a legitimate reason for granting certiorari review.

B. The harmless error doctrine applies to ShisInday's claim; *Crawford v. Washington* does not alter that rule.

Assuming that the trial court erroneously admitted Gilliam's testimony at ShisInday's second trial, ShisInday must establish harm to obtain federal habeas corpus relief. This Court has repeatedly held that Confrontation Clause violations are subject to a harmless-error analysis. *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *Olden v. Kentucky*, 488 U.S. 227, 232-33 (1988); *Coy v. Iowa*, 487 U.S. 1012, 1021-22 (1988); *Neder v. United States*, 527 U.S. 1, 18 (1999); *Lilly v. Virginia*, 527 U.S. 116, 139-40 (1999). Moreover, under *Brecht v. Abrahamson*, federal habeas relief may not be granted for trial error

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can be more easily resolved on the harmless-error issue, the Director will not brief this matter any further.

that, although of constitutional magnitude, did not have a "substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. 619, 637-38 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

ShisInday argues that the Court's holding in *Crawford* "requires reconsideration of the use of harmless error analysis in relation to the Confrontation Clause." Petition at 18. In *Crawford*, this Court held that the admission of a wife's out-of-court statements to police officers, regarding an incident in which the defendant, her husband, allegedly stabbed the victim, violated the Confrontation Clause. The Court held that it was irrelevant whether the wife's statements were deemed reliable by the trial court because the statements were testimonial and the defendant was not given prior opportunity to cross-examine his wife. 541 U.S. at 66-68. ShisInday now contends that *Crawford* distinguishes Confrontation Clause allegations from other trial errors because this Court stated that the lack of opportunity to cross-examine "alone is sufficient to make out a violation of the Sixth Amendment." *Id.* at 68. ShisInday also argues that violations of the Confrontation Clause are different because "[t]here is no way to reliably quantify or predict what would have happened" had he been able to cross-examine Gilliam. Petition at 19. Although Gilliam was cross-examined at ShisInday's first trial, ShisInday's argument fails for five additional reasons.

First, the Court lacks jurisdiction to even consider this claim. ShisInday did not claim in his application for a COA that *Crawford* altered the settled rule that Confrontation Clause allegations are subject to a harmless-error analysis. Petition, Appendix A at 15-17.

His claim pertained solely to *Riggins*. Therefore, under 28 U.S.C. § 1254(1), this Court cannot consider ShisInday's "structural error" allegation because it was not "'pressed [in] or passed on' by the Court of Appeals." *Wells*, 519 U.S. at 488 (quoting *Williams*, 504 U.S. at 41).

Second, ShisInday is completely misreading *Crawford*. The *Crawford* Court only concluded that an indicia-of-reliability test does not apply to testimonial statements. The Court did not reach the issue of harmless error at all. Indeed, the Court did not reverse Crawford's conviction; it reversed the decision of the Washington Supreme Court that the challenged testimony was reliable and remanded the case to that court "for further proceedings not inconsistent with this opinion." *Crawford*, 541 U.S. at 69. Also, the Washington Supreme Court did not reach the issue of harmless error when it previously reinstated Crawford's conviction. *State v. Crawford*, 54 P.3d 656 (Wash. 2002). Implicit in the Court's remand is that the Washington Supreme Court determine whether the error was harmless. For example, in *Lilly v. Virginia*, this Court held that a defendant's right to confrontation was violated and concluded: "Adhering to our general custom of allowing state courts initially to assess the effect of erroneously admitted evidence in light of substantive state criminal law, we leave it to the Virginia courts to consider in the first instance whether this Sixth Amendment error was 'harmless beyond a reasonable doubt.'" 527 U.S. at 139-40 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). Then, as in *Crawford*, the Court remanded the case for further proceedings. *Id.* at 140. ShisInday, therefore, cannot rely on *Crawford* to overcome the harmless-error question. *See Texas v. Cobb*, 532 U.S. 162, 169 (2001) ("Constitutional rights are

not defined by inferences from opinions which did not address the question at issue.").

Third, assuming for a moment that *Crawford* announced a new rule beneficial to ShisInday, he still could not rely on it. In *Whorton v. Bockting*, 127 S. Ct. 1173, 1183-84 (2007), this Court held that *Crawford* does not apply retroactively to cases on collateral review.

Fourth, this Court has already addressed ShisInday's concern about the impact on a trial stemming from a defendant's inability to confront a witness. In *Coy v. Iowa*, this Court recognized that an assessment of harmlessness with regard to Confrontation Clause violations requires a particular approach. The assessment "cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation" because that involves speculation. 487 U.S. at 1021-22. "[H]armlessness must therefore be determined on the basis of the remaining evidence." *Id.* at 1022. Consequently, *Coy* undermines ShisInday's belief that courts "cannot determine, without cross-examination, what impact unconfronted testimony had on a trial overall." Petition at 20.

Fifth, in *Arizona v. Fulminante*, 499 U.S. 279 (1991), this Court divided constitutional error into two classes: trial error and structural defects. *Id.* at 307-08. Trial errors are those that occur during the presentation of the case to the jury and include most constitutional errors. *Id.* at 306-07. They may "be quantitatively assessed in the context of other evidence presented in order to determine whether [the admission of evidence] was harmless beyond a reasonable doubt." *Id.* at 307-08.

The error ShisInday alleges clearly falls into this category because it pertains to his alleged inability to confront a witness. Only a handful of errors amount to structural defects. These include the denial of counsel, the denial of counsel of choice, the denial of self-representation, the denial of a right to a public trial, and the denial of the right to trial by jury by the giving of a defective reasonable-doubt instruction. *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2564 (2006). This Court has never held that Confrontation Clause errors are of this ilk. ShisInday is arguing that *Van Arsdall*, et al., should be overruled, which is a request for a new rule of constitutional law. Therefore, this claim, like the *Riggins* allegation above, is barred under *Teague v. Lane*.

C. Any error was unquestionably harmless given the substantial evidence of ShisInday's guilt.

Both the Fifth Circuit and federal district court determined that any Confrontation Clause violation was harmless under *Brecht v. Abrahamson*. Petition, Appendix A at 16-17, Appendix C at 45-46. This is not a debatable conclusion.

Indisputably, Gilliam's testimony that he sold the gun to ShisInday was not significant. The gun — introduced as State's Exhibit 10 — had already been identified as ShisInday's gun by Martha Tarver, Doyle Peels, and Peels' friend, Ronald McHenry. 15 RR 55-56, 97, 119-20. The gun was seen in ShisInday's possession shortly before Harrison's murder, *id.*, and it was recovered from the driver's side floorboard of ShisInday's car covered in blood. *Id.* at 41; 17 RR 123; 18 RR 111. The blood on the gun matched Harrison's DNA profile. 18

RR 223. Blood was also found on both the inside and outside of the car. 15 RR 40-41; 17 RR 122; 18 RR 110. When the police picked up ShisInday in Galveston, he appeared to have blood stains on his shirt and pants. 17 RR 105. Further, a neighbor confirmed seeing Shisinday's car in Harrison's driveway until approximately midnight, when he noticed smoke and a flash of orange coming from Harrison's home, later determined to have been an intentional fire set in the living room and bedroom. 15 RR 162-64, 183-87.

The most significant evidence presented at trial was, of course, ShisInday's confession. SX 40; 17 RR 217-39. ShisInday became visibly upset when the police showed him a morgue photograph of Sylvia Harrison. 17 RR 109, 208. He asked officer Johnny Freeze if they could talk for a moment, and then he volunteered that he murdered Harrison. 17 RR 111. ShisInday's written confession, which is extremely lengthy and took several hours to compose, followed. *Id.* at 112, 217-39; SX 40. The details of his confession were confirmed when the police found Sylvia Harrison's nude body and conducted their investigation. For example, the police discovered her body submerged in the San Jacinto River. 17 RR 187-97. Just as ShisInday stated, cinder blocks had been tied to her ankles and neck. *Id.* at 196-97. She had been shot in the head, and she sustained numerous contusions and three stab wounds to the face, consistent with Peels "hitting" Harrison in the head with his knife. 18 RR 144-48. Further, Harrison's clothes and personal items were found in the dumpster ShisInday mentioned. *Id.* at 65-73. The condition of her clothes revealed that they had, in fact, been cut off. *Id.* When the police searched ShisInday's car, they found – aside from the gun – a white and orange tinted rope, a knife, and a fan belt cover

in the trunk. *Id.* at 109-13; 17 RR 180. At Harrison's home, the police noticed a new fan belt on her car. 17 RR 84. Inside her purse was a receipt for a fan belt. *Id.* at 85. The owner of an auto parts store testified that Harrison came into the store with two men and purchased the belt. *Id.* at 180. Finally, ShisInday had a noticeable human bite mark on his finger, which he initially claimed was a dog bite. 15 RR 37-38.

In short, the evidence of ShisInday's guilt is substantial. Nonetheless, ShisInday contends that Gilliam's testimony was harmful because the other testimony linking him to the gun was tainted by the personal connections of the witnesses to Peels. Petition at 24. However, this is merely supposition; ShisInday has provided nothing to show that this testimony was unreliable simply because some of the witnesses are related to Zendal Peels. Regardless, as the district court noted, Ronald McHenry is not related to the Peels family. Petition, Appendix C at 45. Although ShisInday argues that McHenry is a friend of the family, Petition at 24 n.6, ShisInday has not demonstrated that this somehow taints McHenry's testimony. Moreover, all of these witnesses were cross-examined regarding their association to Peels. 15 RR 60-61, 106, 114, 127. Thus, the jury was not oblivious to these facts.

More importantly, Gilliam's testimony was trivial because ShisInday's ownership of the gun lacks direct relevance to his conviction. The issue is not whether ShisInday bought the gun from Gilliam, but whether ShisInday shot and killed Harrison. Considering ShisInday's confession, that the gun was found in his car covered in Harrison's blood, and the other evidence discussed above, ShisInday's guilt for committing capital

murder is not in doubt. Therefore, Gilliam's testimony did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637-38.

ShisInday also claims that any error was harmful because he "argued" before the jury that his confession was not reliable. Petition at 25. This is a meritless point. The trial court held a suppression hearing and concluded that ShisInday's confession was properly obtained and admissible. 16 RR 1-101. Subsequently, the Court of Criminal Appeals, federal district court, and Fifth Circuit all determined that ShisInday's confession was not acquired through coercive state action. Petition, Appendix A at 11-14, Appendix C at 63-68, Appendix D at 13-21.

Next, ShisInday contends that the Fifth Circuit erred in placing the burden on him to establish harm. Petition at 25. He is apparently referring to the following language in the Fifth Circuit's opinion: "ShisInday argues that when a petitioner establishes a *Riggins* violation, he need not prove prejudice or harm to obtain relief. We disagree."[5] Petition, Appendix A at 16. ShisInday is misconstruing this statement, which was merely a brief response to *his* allegation. The Fifth Circuit did not explicitly assign a burden of proof to ShisInday. This is demonstrated by the court's conclusion: "Based on *our review* of the record, we agree with the Court of Criminal Appeals that the evidence was cumulative of other

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[5] Because the Fifth Circuit resolved ShisInday's claim under a harmless-error analysis, it did not consider whether a *Riggins* violation occurred or whether ShisInday's claim could even be characterized as such.

properly admitted evidence and thus its admission did not have a substantial and injurious effect on the verdict." *Id.* at 17 (emphasis added). The appellate court's approach is entirely consistent with *O'Neal v. McAninch*, 513 U.S. 432, 436-37 (1995), in which this Court – addressing the role of a judge who applies a harmless-error standard – asserted, "[W]e think it conceptually clearer for the judge to ask directly, 'Do I, the judge, think that the error substantially influenced the jury's decision?' than for the judge to try to put the same question in terms of proof burdens (*e.g.*, 'Do I believe the party has borne its burden of showing ...?')." Moreover, as in the instant case, "[n]ormally a record review will permit a judge to make up his or her mind about the matter." *Id.* at 435. It is only when that review leaves a judge in grave doubt about the likely effect of an error on the jury's verdict that the judge must treat the error as if it did affect the verdict. *Id.* This is not one of those cases, and the Fifth Circuit's analysis was proper.

Finally, ShisInday argues that this Court should grant certiorari review because lower courts have not consistently reconciled the harmless-error standard enunciated in *Van Arsdall* with that in *Brecht*. Petition at 25-27. However, in *Fry v. Pliler*, 127 S. Ct. 2321, 2325 (2007), this Court explained that *Brecht* "clearly assumed that the *Kotteakos* standard would apply in virtually all § 2254 cases." The only exception is for an "unusual case" where "a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct ... infect[s] the integrity of the proceeding." *Id.* (quoting *Brecht*, 507 U.S. at 638 n.9). This Court has never held, nor has ShisInday demonstrated, that an alleged Confrontation Clause violation falls into that category. Therefore, *Brecht* is

clearly the applicable standard. Once again, implicit in ShisInday's claim is a request for a new rule of constitutional law, which would be *Teague*-barred.

For all of the above reasons, the lower court's decision is not debatable, and certiorari review is not warranted.

II. This Court Does Not Have Jurisdiction To Consider ShisInday's Claim That The Texas Statutory Sentencing Scheme Is Unconstitutional Because He Failed To Present That Claim To The Fifth Circuit. Regardless, His Allegation Is *Teague*-Barred And Foreclosed Under *Jones v. United States*.

ShisInday claims that the statute under which he was sentenced to death, Article 37.0711 of the Texas Code of Criminal Procedure, is unconstitutional on its face and as applied to him. Petition at 27-37. To summarize ShisInday's claim, the statute provides that the jury is to return a "yes" or "no" answer to the deliberateness, future-dangerousness, and mitigation special issues. The jury may not answer "yes" to the deliberateness and future-dangerousness issues unless all jurors agree and may not answer "no" unless ten or more agree. With regard to mitigating circumstances, the jury may not answer that issue "no" unless all jurors agree and may not answer "yes" unless ten or more agree. Tex. Code Crim. Proc. art. 37.0711 § 3(b)-(f). The statute also states that if the jury is unable to answer any of the special issues, the court must sentence the defendant to life imprisonment. Tex. Code Crim. Proc. art. 37.0711 § 3(g). However, § 3(i) provides: "The court, the attorney for the state, or the attorney for the defendant may not inform a

juror or prospective juror of the effect of failure of the jury to agree on an issue submitted under this article." Tex. Code Crim. Proc. art. 37.0711 § 3(i).

ShisInday contends that "the prohibition of this part, 3(i), operating in conjunction with part 3(g)" is unconstitutional because it misleads jurors into believing that "a concurrence of ten or more is needed to answer a special issue in a way that will result in a life sentence, when in fact any one juror who believes that the prosecution has failed to meet its burden can effectively cause the imposition of a life sentence." Petition at 30. The result, ShisInday claims, is that a holdout juror who believes that life should be the appropriate sentence will tend to yield to the majority because the juror does not understand the impact his or her vote will have on the sentencing decision. Petition at 31-32. ShisInday further alleges that the statute worked to his detriment because the jury was deadlocked for several days and was instructed to continue deliberating. *Id.* For the following reasons, ShisInday's claim cannot succeed, and certiorari review is not warranted.

A. This Court lacks jurisdiction to consider the instant claim.

In the Fifth Circuit, ShisInday alleged that he was deprived of due process because the trial court instructed the jury to continue deliberating after receiving several notes that the jury was deadlocked. Petition, Appendix A at 14-15. ShisInday argued that the trial court's failure to instruct the jury that a deadlock would result in a life sentence, combined with the instruction that ten votes were needed for a life sentence and the instruction to continue deliberating, resulted in a coerced death

sentence. *Id.*

Thus, ShisInday's claim pertained to the trial court's instructions. He is now raising a specific allegation that the statute governing his punishment proceedings is unconstitutional. Petition at 27-37. Although there are similarities in the claims, ShisInday did not give the Fifth Circuit an opportunity to address the constitutionality of Article 37.0711. Moreover, ShisInday challenges the statute on Eighth Amendment grounds, not simply as a violation of due process. Petition at 32-37. This is a separate issue the lower courts did not resolve. Therefore, this Court lacks jurisdiction to review this claim under 28 U.S.C. § 1254(1) because it was not presented to or considered by the court of appeals. *Wells*, 519 U.S. at 488; *see also Clingman v. Beaver*, 544 U.S. 581, 598 (2005) ("We ordinarily do not consider claims neither raised nor decided below."); *Heath v. Alabama*, 474 U.S. 82, 87 (1985).

B. Regardless, ShisInday is requesting a new rule of constitutional law striking down the Texas statutory scheme for not requiring courts to instruct jurors on the consequences of a deadlock, although this Court has held that such a rule is not relevant to a jury's role in sentencing.

Lack of jurisdiction notwithstanding, this Court has never held that Article 37.0711 is unconstitutional for containing the "objectionable" language of § 3(i). *See Webb v. Collins*, 2 F.3d 93, 95-96 (5th Cir. 1993). Indeed,

this Court has repeatedly held that the Texas special issues pass constitutional muster. *Johnson v. Texas*, 509 U.S. 350, 360-361 (1993); *Franklin v. Lynaugh*, 487 U.S. 164, 182 (1988); *Jurek v. Texas*, 428 U.S. 262, 279 (1976). Moreover, the Texas Court of Criminal Appeals has concluded that the statutory language prohibiting jurors from being informed of the consequences of a deadlock is not unconstitutional. *Hughes v. State*, 897 S.W.2d 285, 301 (Tex. Crim. App. 1994); *Sterling v. State*, 830 S.W.2d 114, 121-22 (Tex. Crim. App. 1992); *Davis v. State*, 782 S.W.2d 211, 221-22 (Tex. Crim. App. 1989). Therefore, ShisInday's argument, which would require this Court to announce a new rule of constitutional law, is barred under *Teague v. Lane*.

Moreover, this Court has rejected the theory that a trial court's failure to instruct the jury as to the consequences of deadlock gives rise to an Eighth Amendment violation. In *Jones v. United States*, the capital defendant wished to inform the jury that the trial judge would impose a life sentence without parole if the jury could not reach a unanimous punishment verdict. 527 U.S. at 379. This Court noted that such issues do not involve the failure to provide the jury with mitigating evidence, but only whether the jury was misled as to its role in the sentencing process. *Id.* at 381-82. In rejecting this contention, the Court held:

> The truth of the matter is that the proposed instruction has no bearing on the jury's role in the sentencing process. Rather, it speaks to what happens in the event that these jury is unable to fulfill its role – when deliberations break down and the jury is unable to produce a unanimous

> sentence recommendation. Petitioner's argument, although less than clear, appears to be that a death sentence is arbitrary within the meaning of the Eighth Amendment if the jury is not given any bit of information that might possibly influence an individual juror's voting behavior. That contention has no merit. We have never suggested, for example, that the Eighth Amendment requires a jury be instructed as to the consequences of a breakdown in the deliberative process. On the contrary, we have long been of the view that "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." *Allen v. United States,* 164 U.S. 492, 501 [] (1896).

Id. at 382. This Court also "recognized that in a capital sentencing proceeding, the Government has 'a strong interest in having the jury express the conscience of the community on the ultimate question of life or death.'" *Id.* (quoting *Lowenfield v. Phelps,* 484 U.S. 231, 238 (1988)). Thus, the instruction ShisInday desires "might well have the effect of undermining this strong governmental interest." *Id.*

Further, the Court declined to require that this type of instruction be given in every capital case. The Court held: "'While this was a correct statement of law it concerned a procedural matter and was not one which should have been the subject of an instruction. It would have been an open invitation for the jury to avoid its responsibility and to disagree.'" *Id.* at 383-84 (quoting

Justus v. Virginia, 266 S.E.2d 87, 92 (1980)). Therefore, despite ShisInday's complaints, he has no constitutional right to the instruction. Consequently, *Jones* forecloses his challenge to the statute.

C. ShisInday's argument that *Jones* is factually distinct from his case and, thus, should not apply is ineffectual. *Jones* did not hold that an instruction regarding the consequences of a deadlock must be given in certain cases. And even if it did, this would not be one of those cases because the Texas statutory scheme does not mislead jurors.

Although ShisInday concedes that *Jones* addresses the issue he is raising, he contends that his case differs in several respects. First, he argues that *Jones* left open the possibility that the failure to instruct the jury as to the consequences of a deadlock could give rise to an Eighth Amendment problem if the jury was "affirmatively misled regarding its role in the sentencing process." *Jones*, 527 U.S. at 381-82 (quoting *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994)); Petition at 33. ShisInday then states that the Texas statute is affirmatively misleading because, unlike the federal statute at issue in *Jones*, it requires the trial court to instruct the jury that a concurrence of ten jurors is needed to sentence a defendant to life although "one juror has the power to effect a life sentence." Petition at 33.

ShisInday's argument is wholly meritless. *Jones* proclaimed that a court's failure to give this instruction could lead to a constitutional dilemma *in theory*. *Jones*,

527 U.S. at 381. In practice, however, the refusal to do so does not mislead because it has no bearing on the jury's role in sentencing; rather, it pertains to a procedural matter in the event the jury cannot fulfill it's role. *Id.* at 382. Further, by quoting *Romano*, the *Jones* Court was, in essence, referring to its holding in *Caldwell v. Mississippi*, 472 U.S. 320 (1985).[6] In *Caldwell*, this Court held that a prosecutor misled the jury about its role in sentencing when he stated that the jury's responsibility for sentencing the defendant lay elsewhere. *Id.* at 336-40. But to establish a *Caldwell* violation, a petitioner must show that remarks to the jury improperly described the jury's role under state law. *Dugger v. Adams*, 489 U.S. 401, 407 (1989). That did not happen in ShisInday's case because the trial court's instructions conformed precisely with Texas law. ShisInday is complaining about what the court did not say regarding a deadlock, which, as *Jones* makes clear, is not required.

Importantly, the Court of Criminal Appeals has repeatedly pointed out the flaws in arguments, like ShisInday's, that the Texas 12-10 rule is misleading. In *Lawton v. State*, 913 S.W.2d 542, 559 (Tex. Crim. App. 1995), the court explained:

> [W]hile it is true that the jury is instructed that they may not answer any of the special issues in a manner that would result in a life sentence unless ten jurors agree to that answer, this instruction follows the instruction that the jury may not answer

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[6] The petitioner in *Romano* argued that he should be granted relief pursuant to *Caldwell*. *Romano*, 512 U.S. at 8-10.

> any of the special issues in a manner resulting in capital punishment unless the verdict is unanimous. Under these facts, appellant's argument that jurors will be misled lacks merit; every juror knows that capital punishment cannot be imposed without the unanimous agreement of the jury on all three special issues. The jury is not informed of the consequences of a hung jury, *but each juror will know that without his or her vote the death sentence cannot be imposed.*

Id. at 559 (emphasis added). And in *Draughon v. State*, 831 S.W.2d 331 (Tex. Crim. App. 1992), the court correctly held that a defendant has no right for the jury to be told of the consequences of their failure to agree because "[a]bstention is not a jury option. Rather ... it is merely a consequence of the jury's inability to exercise its available options by reaching a verdict. It is not, nor would it be appropriate to suggest that it is, a verdict itself." *Id.* at 338. Thus, ShisInday's argument that the statute misinforms jurors about their role has no basis in law or fact.

Second, ShisInday contends that *Jones* differs because this Court held that lower courts are not required in every capital case to give an instruction regarding the consequences of a deadlock, whereas Texas law "prohibits the trial court from *ever* instructing the jury" in that manner. Petition at 33-34 (emphasis in original). This is a frivolous argument. Obviously, if such an instruction is not required, then a state can never run afoul of the Constitution by repeatedly refusing to give it. The *Jones* Court did not hold that a jury must, or even should,

receive the instruction in certain cases.

Third, ShisInday argues that the Texas statute, unlike the federal statute in *Jones*, appears to operate by mistake and not design. Petition at 34. Prior to 1981, in a capital case, a hung jury on punishment resulted in a mistrial. *See Padgett v. State*, 717 S.W.2d 55, 58 (Tex. Crim. App. 1986). In 1981, the Legislature amended the statute to require the imposition of a life sentence in the event of a hung jury. *Id.* The purpose of this change was to prevent the lengthy delays and expense of retrying a capital defendant. *Id.* The Legislature also added the provision banning the jury from receiving information about the consequences of a deadlock. *Id.* ShisInday argues, in essence, that the Legislature put no consideration into how the new amendments would conflict with, or "render obsolete," the 12-10 requirements. Petition at 35. ShisInday is incorrect because there is no conflict. As stated above, a deadlock-imposed life sentence is a procedural issue. It is not, and never has been, a sentencing option for a jury under Texas law. Moreover, there is no evidence that the Legislature ever intended a non-answer on a special issue to actually be an answer. *See Padgett*, 717 S.W.2d at 58. Although that is now the procedural outcome, the Legislature's obvious goal via the two amendments was to prevent retrials but not absolve the jury of its responsibility to answer the special issues.

And that is one the primary problems with ShisInday's claim: he fails to comprehend why Texas has the 12-10 rule and the prohibition against informing the jury of the consequences of a deadlock. The 12-10 rule was designed to stress juror unanimity and consensus either for or against a death sentence. It is "likely to

stimulate in jurors a more serious approach to their task by encouraging them to reach agreement through continued deliberation rather than to abandon hope of consensus prematurely." *Draughon*, 831 S.W.2d at 337. Moreover, "[t]he issues are framed in a manner which permits them to be answered either affirmatively or negatively, and it is the purpose of the deliberative process to resolve juror vacillation." *Nobles v. State*, 843 S.W.2d 503, 510 (Tex. Crim. App. 1992). This also discourages a juror from skirting his or her responsibility by failing to return a vote. *Id.* Additionally, although ShisInday complains that the rule somehow "coerces" a holdout juror into voting with the majority, the opposite could happen if a juror is aware of the consequences of a deadlock. In other words, "'a juror convinced of the appropriateness of a life sentence [might] refuse to consider the evidence and the views of other jurors in support of the death penalty, knowing that his blind obstinance would preforce result in a life sentence.'" *Davis*, 782 S.W.2d at 221 (quoting *Barfield v. Harris*, 540 F.Supp. 451, 472 n.17 (E.D.N.C. 1982)). Thus, as the *Jones* Court acknowledged, acceptance of ShisInday's argument would provide jurors an "open invitation" to abdicate their responsibilities in order to reach a desired outcome.

Fourth, and related to the above, ShisInday claims that the statute operates in an arbitrary manner because the ban of § 3(i) was lifted after 1991 but remains in place for him. Petition at 35. This is an erroneous assertion. In 1991, the Texas Legislature did not eliminate the language prohibiting the trial court or the parties from informing the jury of the consequences of the failure to agree on the special issues; it simply moved that language to the end of Article 37.071 § 2(a). H.B. 9, § 15,

72nd Leg., 2nd Sess. (Tex. 1991). Therefore, the "ban" is still in place.

Fifth, ShisInday claims that the facts of his case are distinguishable from *Jones* because the petitioner in *Jones* was unable to show that any confusion worked to his detriment, whereas a few jurors in ShisInday's case held out for several days. Petition at 36. Thus, he argues it is likely the jurors would have continued to hold out had they known of the consequences of a deadlock. *Id.* However, *Jones* did not hinge on the duration of juror deliberations; the Court simply stated that where the effect of an alleged instruction error is so uncertain, a defendant cannot show that his substantial rights were violated. *Jones*, 527 U.S. at 394-95. And because confusion over the consequences of a deadlock could lead a jury in either direction, it's potential effect is speculative. *Id.* Moreover, ShisInday's claim is premised on the faulty assumption that heated deliberations equates to confusion. But the punishment phase of his case lasted three days, eighteen witnesses were presented, 120 exhibits were introduced, and the jury was required to reconsider the evidence presented during guilt-innocence. Petition, Exhibit C at 25. The reasonable deduction is not that the jurors were confused, but that they had significant disagreements about the weight of the evidence. And despite those disagreements, they did make slow progress in reaching a verdict, which is why the trial court informed the jurors to continue deliberating and did not declare a hung jury. *Id.* at 25-37.

Last, ShisInday asks this Court to grant certiorari review in order to clarify those circumstances in which an instruction regarding a deadlock might be appropriate.

Petition at 36. But, as stated, *Jones* did not delve into this issue because that information has no relevance to the jury's role in sentencing and, thus, cannot mislead. *Jones*, 527 U.S. at 382. Either there are no such circumstances or they are so abstract that further consideration of the matter would be futile. Regardless, even if this Court did identify a scenario where a court should give an instruction about the consequences of a deadlock, (1) it would not be the instant case, and (2) ShisInday would be barred from relying on the new rule under *Teague v. Lane*.

Based on the foregoing, ShisInday's complaints about the Texas sentencing scheme are waived and meritless. Consequently, certiorari review is not warranted.

CONCLUSION

For the above reasons, the Director respectfully requests that ShisInday's petition for writ of certiorari be denied.

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